

Memorandum

To: Julie Dubick
From: James Ingram
Re: Proposed Language on Filling Vacancies
Date: July 25, 2007

Per the Subcommittee's request, the staff has drafted straw language regarding the vacancy provisions of the Charter. The following language would provide for a more flexible process for filling vacancies.

Proposed Language

Sec. AAA. Vacancy in City Offices.

An office becomes vacant when:

(a) the incumbent dies, retires, resigns, is adjudged insane, pleads guilty or no contest to or is convicted of a felony, is removed from office or fails to qualify within ten days from the time he or she receives his or her certificate of election or appointment;

(b) the incumbent ceases to be a registered voter or resident of the City, where being a registered voter or City residency is a qualification for the office;

(c) the incumbent is convicted of an offense involving a violation of official duties, including, without limitation, a violation of the conflict of interest and government ethics provisions of the Charter or City ordinances. However, removal from office for violating conflict of interest or governmental ethics provisions shall be required only if a court determines that the seriousness of the offense and degree of culpability of the officer so warrant;

(d) the incumbent has been absent from the City without the consent of the Council for more than 60 consecutive days. Absence from the City of the incumbent of an elected office shall be deemed to be with the consent of the Council if the absence was caused by illness, injury or other reason, and if the incumbent could not reasonably have been expected to have returned to the City under the circumstances;

(e) the incumbent of an elected office has ceased to discharge the duties of the office for 90 consecutive days, except when prevented by illness, injury, or other reasonable cause; or

(f) the incumbent of an elected office is found by a court to be incapacitated according to the criteria contained in Section BBB.

Sec. BBB. Determination of Incapacity.

(a) For purposes of Section AAA(f), an elected office becomes vacant when, in a *quo warranto* action or other applicable proceeding as may be established by state law, a court has found that:

(1) the incumbent is physically or mentally incapacitated due to illness, injury or other reason such that he or she cannot perform the duties of the office;

(2) the incumbent was so incapacitated for at least 90 consecutive days prior to the filing of the application with the Office of the California Attorney General for leave to sue in *quo warranto* or, if the application was not legally required, any other act commencing litigation under this subsection; and

(3) there is reasonable cause to believe that the incumbent will not be able to perform the duties of the office for the remainder of the term of office.

(b) If the City Clerk, after investigation, has reason to believe that all of the conditions set forth in subsection (a) exist, the City Clerk, on behalf of the City, shall initiate, or cause to be initiated, litigation by filing an application for leave to sue in *quo warranto* with the Office of the California Attorney General or by following any other applicable procedure as may be established by state law. Litigation under this section, in *quo warranto* or as otherwise provided by state law, may also be brought by any person authorized to do so by state law.

Sec. CCC. Filling Vacancies in the Offices of Mayor, City Attorney and Member of the City Council.

Vacancies in the offices of Mayor, City Attorney and members of the City Council shall be filled by either appointment or election in the manner set forth in this section. If a vacancy exists by reason of resignation of the incumbent, and the resignation has not been required as a result of criminal, malfeasant or otherwise unacceptable action by the incumbent, the incumbent may hold office until a successor is appointed or elected.

(a) Appointment. The Council may fill a vacancy by appointing a person to hold the office for the portion of the unexpired term remaining through the next June 30 of an odd-numbered year. If any portion of the term remains after that date, the Council shall also call a special election or elections to fill the remainder of the term, and shall consolidate the election with the primary nominating election and general municipal election next following the appointment. If a vacancy is filled by appointment after the first date fixed by law for filing a Declaration of Intention to become a candidate at the next primary nominating election, the person appointed shall hold the office for the remainder of the unexpired term.

(b) Special Election. Instead of filling a vacancy by appointment, the Council may call a special election, and special runoff election, if necessary, by ordinance for the purpose of filling the vacancy for the remainder of the unexpired term. The Council shall provide in the ordinance for the consolidation of the election with any other election and for the procedure for nominating candidates, including the amount of the filing fee, if any, to be paid by candidates and other matters pertaining to the election. In the case of a tie vote, the Council shall decide which candidate receiving an equal number of votes is elected to fill the vacancy.

(c) Recall. Any person appointed or elected to fill a vacancy may be removed from office by the recall in the same manner as if he or she had been elected to office.

Staff Analysis

The above language draws on the Los Angeles Charter as a model. June 30 is the end of that city's fiscal year, and thus is a convenient coordination point. If the above language were adopted, then the City of San Diego would handle all vacancies in elected office through a single, uniform procedure.

The language also addresses two problems raised by Council resident Scott Peters at our last Subcommittee meeting. First of all, an incumbent who resigns could hold office until the successor replaces him or her, unless criminality or other unacceptable kinds of behavior forced the resignation. Secondly, this language should allow greater leeway, so that elections do not have to be called at a

particularly inauspicious time, such as when people are involved in their holiday observances.

There are a number of current Charter sections which would need alteration if the proposed language were adopted:

Relevant Language from the Current San Diego Charter

"SECTION 12. THE COUNCIL.

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(h) If a vacancy occurs for any reason in the office of a Council District, the procedures set forth in Charter section 12(h) shall be followed:

(1) If the vacancy occurs for any reason other than a successful recall election, and,

(A) If the vacancy occurs with one (1) year or less remaining in the term, the Council shall appoint a person to fill the vacant seat on the City Council. Any person appointed by the Council to fill a vacant Council District seat shall not be eligible to run for that office for the next succeeding term; or,

(B) If the vacancy occurs with more than one (1) year remaining in the term, the Council shall call a special election to be held within ninety (90) days of the vacancy, unless there is a regular municipal or statewide election scheduled to be held within 180 days of the vacancy. If there is a regular municipal or statewide election scheduled to be held within 180 days of the vacancy, the Council may consolidate the special election with that regular election.

(i) If one candidate receives the majority of the votes cast for all candidates in the special election, the candidate receiving the majority of votes cast shall be deemed to be and declared by the Council to be elected to the vacant office.

(ii) If no candidate receives a majority of votes cast in the special election, a special run-off election shall be held within forty-nine (49) days of the first special election, unless there is a regular municipal or statewide election scheduled to be held within ninety (90) days of the proposed special run-off election date, at which time the City Council may consolidate the special run-off election with that regular election. The two (2) candidates receiving the highest number of votes cast for the vacant seat in the first special election shall be the only candidates for the vacant Council seat and the names of only those two (2) candidates shall be printed on the ballot for that seat.

(2) If a vacancy occurs by reason of a successful recall election, the Council shall adopt procedures to fill the vacancy.

Whether a person is appointed or elected to fill a vacant Council District seat, whatever the reason for the vacancy, that person shall serve as that District's Councilmember for the remainder of the unexpired term.

For purposes of Charter section 12(h), a vacancy may result from death, resignation, recall, or unexcused absences as described in Charter section 12(i). If a vacancy occurs by reason of a resignation, the date of the vacancy will be the date specified in the written letter of resignation or, if there is no date certain specified in the letter, upon the date of receipt of the letter by the City Clerk."

"SECTION 24. MAYOR.

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In the event of a vacancy occurring in the office of the Mayor, existing by reason of any cause, the Council shall have authority to fill such vacancy, provided, however, that if the Council shall fail to fill such vacancy by appointment within thirty (30) days after the vacancy, the Council must immediately cause an election to be held to fill such vacancy. Any person appointed to fill such vacancy, shall hold office only until the next regular municipal election, at which date a person shall be elected to serve for the remainder of such unexpired term."

"SECTION 40. CITY ATTORNEY.

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In the event of a vacancy occurring in the office of the City Attorney by reason of any cause, the Council shall have authority to fill such vacancy, which said authority shall be exercised within thirty (30) days after the vacancy occurs. Any person appointed to fill such vacancy shall hold office until the next regular municipal election, at which time a person shall be elected to serve the unexpired term. Said appointee shall remain in office until a successor is elected and qualified."

Los Angeles Charter Language

"Sec. 207. Vacancy in City Offices.

An office becomes vacant when:

(a) the incumbent dies, retires, resigns, is adjudged insane, pleads guilty or no contest to or is convicted of a felony, is removed from office or fails to qualify within ten days from the time he or she receives his or her certificate of election or appointment;

(b) the incumbent ceases to be a registered voter or resident of the City, where being a registered voter or City residency is a qualification for the office;

(c) the incumbent is convicted of an offense involving a violation of official duties, including, without limitation, a violation of the conflict of interest and government ethics provisions of the Charter or City ordinances. However, removal from office for violating conflict of interest or governmental ethics provisions shall be required only if a court determines that the seriousness of the offense and degree of culpability of the officer so warrant;

(d) the incumbent has been absent from the City without the consent of the Council for more than 60 consecutive days. Absence from the City of the incumbent of an elected office shall be deemed to be with the consent of the Council if the absence was caused by illness, injury or other reason, and if the incumbent could not reasonably have been expected to have returned to the City under the circumstances;

(e) the incumbent of an elected office, or the Chief of Police has ceased to discharge the duties of the office for 90 consecutive days, except when prevented by illness, injury, or other reasonable cause; or

(f) the incumbent of an elected office, or the Chief of Police is found by a court to be incapacitated according to the criteria contained in Section 208.

Sec. 208. Determination of Incapacity.

(a) For purposes of Section 207(f), an elected office and the office of Chief of Police become vacant when, in a *quo warranto* action or other applicable proceeding as may be established by state law, a court has found that:

(1) the incumbent is physically or mentally incapacitated due to illness, injury or other reason such that he or she cannot perform the duties of the office;

(2) the incumbent was so incapacitated for at least 90 consecutive days prior to the filing of the application with the Office of the California Attorney General for leave to sue in *quo warranto* or, if the application was not legally required, any other act commencing litigation under this subsection; and

(3) there is reasonable cause to believe that the incumbent will not be able to perform the duties of the office for the remainder of the term of office.

(b) If the City Clerk, after investigation, has reason to believe that all of the conditions set forth in subsection (a) exist, the City Clerk, on behalf of the City, shall initiate, or cause to be initiated, litigation by filing an application for leave to sue in *quo warranto* with the Office of the California Attorney General or by following any other applicable procedure as may be established by state law. Litigation under this section, in *quo warranto* or as otherwise provided by state law, may also be brought by any person authorized to do so by state law.

Sec. 209. Code of Conduct of Elected Officials; Censure.

All elected officials of the City are expected to conform to the highest standards of personal and professional conduct. The Council shall have the power to adopt, by a two-thirds vote, a resolution of censure with respect to any member of the Council whose actions constitute a gross failure to meet such high standards, even if the action does not constitute a ground for removal from office under the Charter.

Sec. 210. Acting Incumbency in City Offices.

The City Controller, City Attorney, Treasurer, City Clerk and Director of the Office of Administrative and Research Services shall each designate an assistant or deputy, who shall become the acting incumbent in case of any vacancy in the office. The designation of acting incumbent shall be made in writing filed with the City Clerk, and may be changed from time to time. Upon a vacancy, the acting incumbent shall serve until the office is filled in accordance with Sections 409, 508(b) or 508(c). Any person so designated must possess the qualifications prescribed for the office and shall take the oath prescribed by the Charter before assuming his or her duties as acting incumbent. If a vacancy in the office occurs, and no acting incumbent has been designated, or if the designated acting incumbent is unable to serve, the Council may designate the acting incumbent for the office.

Sec. 211. Suspension Pending Trial.

Pending trial, the Council may suspend any elected officer, and the appointing power may suspend any appointed officer, against whom felony criminal proceedings, or criminal misdemeanor proceedings related to a violation of official duties as described in Section 207(c). The temporary vacancy shall be filled in accordance with the Charter.

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Sec. 409. Filling Vacancies in the Offices of Mayor, City Attorney, Controller and Member of the City Council.

Vacancies in the offices of Mayor, City Attorney, Controller and members of the City Council shall be filled by either appointment or election in the manner set forth in this section.

(a) Appointment. The Council may fill a vacancy by appointing a person to hold the office for the portion of the unexpired term remaining through the next June 30 of an odd-numbered year. If any portion of the term remains after that date, the

Council shall also call a special election or elections to fill the remainder of the term, and shall consolidate the election with the primary nominating election and general municipal election next following the appointment. If a vacancy is filled by appointment after the first date fixed by law for filing a Declaration of Intention to become a candidate at the next primary nominating election, the person appointed shall hold the office for the remainder of the unexpired term.

(b) Special Election. Instead of filling a vacancy by appointment, the Council may call a special election, and special runoff election, if necessary, by ordinance for the purpose of filling the vacancy for the remainder of the unexpired term. The Council shall provide in the ordinance for the consolidation of the election with any other election and for the procedure for nominating candidates, including the amount of the filing fee, if any, to be paid by candidates and other matters pertaining to the election. In the case of a tie vote, the Council shall decide which candidate receiving an equal number of votes is elected to fill the vacancy.

(c) Recall. Any person appointed or elected to fill a vacancy may be removed from office by the recall in the same manner as if he or she had been elected to office."